

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT	)	
YANKEE, LLC	)	
AND ENTERGY NUCLEAR	)	Docket No. 50-271-LA
OPERATIONS, INC.	)	
	)	
(Vermont Yankee Nuclear Power Station)	)	

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NRC STAFF'S ANSWER TO  
VERMONT DEPARTMENT OF PUBLIC SERVICE NOTICE OF INTENTION  
TO PARTICIPATE, PETITION TO INTERVENE, AND HEARING REQUEST

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1) and in accordance with the provisions of the October 6, 2014 Order Granting Request to Clarify Schedule for Answers and Reply<sup>1</sup> by the Atomic Safety and Licensing Board (Board) established in this matter, the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this answer in opposition to the "Vermont Department of Public Service Notice of Intention to Participate, Petition to Intervene, and Hearing Request" (Petition)<sup>2</sup> filed by the State of Vermont, through the Vermont Department of Public Service (Vermont). As set forth below, the Board should deny Vermont's Petition because its proposed contention is inadmissible because (1) it raises issues that are beyond the scope of this license amendment proceeding, (2) it raises issues that are not material to the findings that the NRC must make in this license amendment proceeding, (3) it constitutes an impermissible challenge

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<sup>1</sup> Order (Granting Request to Clarify Schedule for Answers and Reply) (Oct. 6, 2014) (unpublished) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML14279A281) (Scheduling Order).

<sup>2</sup> Vermont Department of Public Service Notice of Intention to Participate, Petition to Intervene, and Hearing Request (dated Sept. 22, 2014; filed via the NRC's E-Filing system Sept. 24, 2014) (ADAMS Accession No. ML14267A523) (Petition).

to the Commission's regulations, and (4) its associated request for the application of Subpart G hearing procedures fails to meet the applicable regulatory requirements.

### BACKGROUND

This proceeding concerns a March 24, 2014 license amendment request (LAR) filed by Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, Entergy or the licensee) to reduce staffing levels at the Vermont Yankee Nuclear Power Station (Vermont Yankee) following the facility's permanent shutdown planned for the end of its current operating cycle.<sup>3</sup> Vermont Yankee is a boiling-water reactor (BWR) located in the Town of Vernon, Windham County, Vermont.<sup>4</sup>

The Staff accepted the LAR for review and published a *Federal Register* notice on July 22, 2014 stating, in relevant part, that the LAR involved no significant hazards consideration because "operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated, or (2) create the possibility of a new or different kind of accident from any accident previously evaluated[,] or (3) involve a significant reduction in a margin of safety" and, therefore, that the amendment could be issued prior to any hearing taking place on the amendment.<sup>5</sup> The *Federal Register* notice included a notice of opportunity to request a hearing and stated that any such request must be filed via the NRC's E-Filing system no later than 60 days from the date of

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<sup>3</sup> See Letter from Christopher J. Wamser, Site Vice President, Entergy, to the NRC, Proposed Changes to the Vermont Yankee Emergency Plan, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Mar. 24, 2014) (ADAMS Accession No. ML14085A257) (LAR).

<sup>4</sup> See Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Docket No. 50-271, Renewed Facility Operating License, Renewed Operating License No. DPR-28, at 2 (Mar. 21, 2011) (ADAMS Accession No. ML052720265).

<sup>5</sup> Biweekly Notice, Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 79 Fed. Reg. 42,539, 42,540 (July 22, 2014).

the notice.<sup>6</sup> Accordingly, the due date for the timely filing of any request for a hearing via the NRC's E-Filing system regarding this LAR was September 22, 2014.<sup>7</sup>

On the filing deadline, September 22, 2014, Vermont contacted the NRC Office of the Secretary and provided the instant Petition via email.<sup>8</sup> Vermont subsequently resubmitted its Petition via the NRC's E-Filing system on September 24, 2014.<sup>9</sup>

On an unopposed motion for clarification filed by the Staff,<sup>10</sup> the Board issued a scheduling order that set an October 20, 2014 deadline for the Staff's and Entergy's answers to Vermont's Petition and an October 27, 2014 deadline for any Vermont reply thereto.<sup>11</sup>

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<sup>6</sup> *Id.* at 42,540-42.

<sup>7</sup> *Id.* at 42,539.

<sup>8</sup> See Memorandum from Annette L. Vietti-Cook, NRC Office of the Secretary, to E. Roy Hawken, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, Referring a Request for Hearing and Petition to Intervene with Respect to the License Amendment Request of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. for the Vermont Yankee Nuclear Power Station, Docket No. 50-271, at 1 (Sept. 30, 2014) (ADAMS Accession No. ML14273A498) (ASLBP Referral Letter). Counsel for Vermont stated that Vermont was "not able to file [its Petition] through the web-based submission form for e-filings, so [it is filing] by email." *Id.* at 2. However, Vermont provided no explanation of the nature of the issue it had, if any, with the NRC's E-Filing system. Vermont also did not address the fact that the *Federal Register* notice specified that, in order to comply with the NRC's E-Filing rule, a participant should contact the NRC Office of the Secretary (Secretary) at least 10 days prior to the filing deadline to advise the Secretary that the participant will be submitting a request for hearing so that the Secretary may establish an electronic docket for the hearing in which the participant may electronically file. 79 Fed. Reg. at 42,541. Moreover, 10 C.F.R. § 2.302(a) requires that "[d]ocuments filed in Commission adjudicatory proceedings . . . shall be electronically transmitted through the E-Filing system, unless the Commission or presiding officer grants an exemption permitting an alternative filing method or unless the filing falls within the scope of [10 C.F.R. § 2.302(g)(1)]." However, Vermont neither obtained a Commission or presiding officer order allowing it to submit its Petition via email nor was its filing consistent with the exception in 10 C.F.R. § 2.302(g)(1). There is also no record of any request by Vermont for an extension of time to file via the NRC's E-Filing system after the September 22, 2014 deadline. Absent an explanation or demonstration of good cause, the timeliness of Vermont's filing remains an open issue and is not waived.

<sup>9</sup> See ASLBP Referral Letter, at 1.

<sup>10</sup> NRC Staff's Unopposed Motion to Clarify the Filing Schedule With Respect to the Vermont Department of Public Service Notice of Intention to Participate, Petition to Intervene, and Hearing Request (Oct. 2, 2014) (ADAMS Accession No. ML14275A467).

<sup>11</sup> Scheduling Order.

## DISCUSSION

### I. Legal Standards

#### A. Standing Requirements

In order to grant a hearing request, a Board must determine that the requestor has demonstrated that it has an interest in the proceeding that is sufficient to justify its intervention and support a finding of standing.<sup>12</sup> Where, however, a State requests a hearing or files a petition to intervene, no such demonstration of standing is required “[i]f the proceeding pertains to a production or utilization facility . . . located within the boundaries of the State . . . seeking to participate as a party . . . .”<sup>13</sup> Since this proceeding pertains to Vermont Yankee, a utilization facility located within the boundaries of Vermont, the Staff does not challenge Vermont’s standing in this proceeding.<sup>14</sup>

#### B. Contention Admissibility Requirements

For a hearing request to be granted, the requestor must propose at least one admissible contention that meets all of the requirements of 10 C.F.R. § 2.309(f).<sup>15</sup> A proposed contention is admissible under 10 C.F.R. § 2.309(f) if it:

(i) Provide[s] a specific statement of the issue of law or fact to be raised or controverted . . . ;

(ii) Provide[s] a brief explanation of the basis for the contention;

(iii) Demonstrate[s] that the issue raised in the contention is within the scope of the proceeding;

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<sup>12</sup> See *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). The regulations at 10 C.F.R. §§ 2.309(a) and (d) provide the general standing requirements.

<sup>13</sup> 10 C.F.R. § 2.309(h)(1)-(2).

<sup>14</sup> See, e.g., *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 144 (2006) (finding that the Vermont Department of Public Service automatically has standing in a proceeding concerning Vermont Yankee, which is located within the boundaries of the State of Vermont), *rev’d in part on other grounds*, CLI-07-16, 65 NRC 371 (2007).

<sup>15</sup> 10 C.F.R. § 2.309(a).

(iv) Demonstrate[s] that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide[s] a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]

(vi) . . . provide[s] sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application . . . .<sup>[16]</sup>

Pursuant to 10 C.F.R. § 2.309(f)(1)(iii), a proposed contention must be rejected if it raises issues outside of the scope of the proceeding.<sup>17</sup> Thus, a proposed contention that challenges a license amendment must confine itself to “health, safety or environmental issues fairly raised by [the license amendment].”<sup>18</sup> Moreover, a proposed contention must be rejected if it challenges NRC regulations, because such a challenge is necessarily beyond the scope of the proceeding.<sup>19</sup> Finally, a proposed contention must be rejected if it raises an issue that the Atomic Safety and Licensing Board is not authorized to adjudicate.<sup>20</sup> For example, a licensing

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<sup>16</sup> 10 C.F.R. § 2.309(f)(1).

<sup>17</sup> See *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 400, 411-12 (1991).

<sup>18</sup> *Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 624 (1981).

<sup>19</sup> See *Palo Verde*, LBP-91-19, 33 NRC at 410; *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974) (“[A] licensing proceeding before this agency is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission’s regulatory process.”).

<sup>20</sup> See *Public Service Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

board has “no jurisdiction” to rule on the propriety of a Staff determination that a proposed license amendment presents no significant hazards considerations.<sup>21</sup>

A proposed contention otherwise inadmissible as an out-of-scope collateral attack on a Commission rule may, however, be entertained if (1) the proponent of the contention petitions for the waiver of the rule in the particular proceeding, (2) the presiding officer determines that the waiver petition has made a *prima facie* showing that the application of the specific rule would not serve the purposes for which the rule was adopted and then certifies the matter directly to the Commission, and (3) the Commission makes a determination on the matter.<sup>22</sup> If the presiding officer determines that the petitioning participant has not made the required *prima facie* showing, “no evidence may be received on [the] matter and no discovery, cross examination, or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.”<sup>23</sup> Instead, the participant may challenge the rule by filing a petition for rulemaking under 10 C.F.R. § 2.802.<sup>24</sup>

Pursuant to 10 C.F.R. § 2.309(f)(1)(iv), a proposed contention must be rejected if it raises an issue that is not material to the findings the NRC must make to support the action that is involved in the proceeding. The proponent of a proposed contention in a licensing proceeding “must demonstrate that the subject matter of the contention would impact the grant or denial of [the] pending license application.”<sup>25</sup> In other words, the issue in the proposed contention “must

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<sup>21</sup> *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), LBP-98-24, 48 NRC 219, 222-23 (1998). *See also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179, 183 (1991) (stating that “a Licensing Board is without authority to review Staff’s significant hazards consideration determination” and, therefore, challenges to the Staff’s significant hazards consideration determination are “beyond the scope of the hearing on the proposed amendment.”).

<sup>22</sup> 10 C.F.R. § 2.335.

<sup>23</sup> 10 C.F.R. § 2.335(c).

<sup>24</sup> 10 C.F.R. § 2.335(e).

<sup>25</sup> *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 62 (2008).



make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief.”<sup>26</sup>

Finally, the Commission has emphasized that the 10 C.F.R. § 2.309(f)(1) contention admissibility requirements are “strict by design.”<sup>27</sup> Failure to comply with any one of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for dismissing the proposed contention.<sup>28</sup>

### C. Informal Hearings Under Subpart L

The Commission’s regulations at 10 C.F.R. § 2.310(a) provide that, “[e]xcept as determined through the application of paragraphs (b) through (h) of this section, proceedings for . . . licensee-initiated amendment . . . of licenses . . . may be conducted under the procedures of subpart L of this part.” The Statement of Considerations that accompanied the issuance of the Part 2 Adjudicatory Rules reiterated that the informal hearing provisions in the “Subpart L procedures [should] be used, as a general matter, for hearings on . . . nuclear power reactor license amendments under Part 50 . . . .”<sup>29</sup> In contrast, 10 C.F.R. § 2.310(d) provides that the formal and more extensive hearing and discovery procedures of Subpart G should only be used where the presiding officer by order finds that resolution of the contention necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive

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<sup>26</sup> *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998).

<sup>27</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsid’n denied*, CLI-02-01, 55 NRC 1 (2002).

<sup>28</sup> *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999), *citing Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

<sup>29</sup> Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,222 (Jan. 14, 2004) (final rule). See also *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 692 (2004) (explaining that the 2004 amendments to Part 2 reflect the Commission’s policy “to move away from the trial-type, adversarial format to resolve technical disputes” believing that “in most instances, the use of the full panoply of formal, trial-like adjudicatory procedures . . . is not essential to the development of an adequate hearing record”), *quoting* 69 Fed. Reg. at 2,182.

or intent of the party or eyewitness material to the resolution of the contested matter.<sup>30</sup>

Therefore, a petitioner requesting a Subpart G hearing pursuant to 10 C.F.R. § 2.310(d) “must demonstrate, by reference to the contention and the bases provided and the specific procedures in subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.”<sup>31</sup>

## II. The Petition Should Be Denied for Failing to Proffer an Admissible Contention

Vermont’s proposed contention states that

Entergy has failed to ensure a Radiological Monitoring System that will provide the information that the State needs to assess Vermont Yankee conditions as part of the State’s protective action decision-making process, and Entergy has thus failed to demonstrate that its license amendment request (1) will not significantly reduce the margin of safety or significantly increase the consequences of an accident previously evaluated as required by 10 CFR § 50.92; (2) will provide adequate protection for the public health and safety as required by 10 CFR § 50.57(a)(3); and (3) will comply with the requirements of 10 CFR § 50.47 to provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.<sup>[32]</sup>

Vermont’s proposed contention boils down to a complaint that the emergency response data system (ERDS) link that Entergy maintains between Vermont Yankee and the NRC will no longer be available following the permanent shutdown<sup>33</sup> of Vermont Yankee. ERDS is a direct, near real-time electronic data link between Vermont Yankee’s onsite computer system and the NRC’s Operations Center that, when activated, transmits selected parameters from the plant to

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<sup>30</sup> See also *Vermont Yankee*, LBP-04-31, 60 NRC at 694-95.

<sup>31</sup> 10 C.F.R. § 2.309(g).

<sup>32</sup> Petition at 3-4.

<sup>33</sup> “Permanent shutdown” refers to the condition of a nuclear power plant following its permanent cessation of operations and permanent fuel removal as certified to by the licensee under oath or affirmation pursuant to 10 C.F.R. §§ 50.4(b)(8), 50.4(b)(9), and 50.82(a)(1).

the NRC.<sup>34</sup> Vermont's Petition requests that the NRC maintain ERDS after the permanent shutdown of Vermont Yankee or, if ERDS is not maintained, that some alternate means be established to provide to Vermont similar information as that provided by ERDS for as long as fuel remains within Vermont Yankee's spent fuel pool.<sup>35</sup> Vermont further requests that a "full evidentiary hearing conducted under 10 CFR Part 2, Subpart G" be held to resolve this issue.<sup>36</sup>

A. The Issue Raised in the Proposed Contention is Not Within the Scope of this Proceeding

The issue raised in Vermont's proposed contention is not within the scope of this proceeding for three reasons: (1) it complains of matters that are beyond the scope of the instant LAR; (2) it collaterally attacks the Commission's regulations; and (3) it challenges the Staff's no significant hazards consideration (NSHC) determination. Accordingly, Vermont's proposed contention is inadmissible under 10 C.F.R. § 2.309(f)(1)(iii).

1. The Proposed Contention Complains of Matters that Are Beyond the Scope of the LAR

In a challenge to a license amendment request, the scope of the license amendment dictates the scope of the proceeding.<sup>37</sup> As the Commission has observed, "the scope of any hearing should include the proposed license amendments, and any health, safety or

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<sup>34</sup> See 10 C.F.R. Part 50, Appendix E, Section VI. These parameters include information regarding the plant's reactor coolant system, safety injection system, containment system, radiation monitoring system, and meteorological system. *Id.*

<sup>35</sup> Petition at 5.

<sup>36</sup> Petition at 5-6.

<sup>37</sup> See *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-12-25, 76 NRC 540, 552, 557 (2012) (holding that part of a proposed contention was inadmissible under 10 C.F.R. § 2.309(f)(1)(iii) because it "challenge[d] a provision that is in the current license, that is not being changed, and that is not part of the requested license amendment") *vacated as moot* CLI-13-10, 78 NRC 563 (2013); *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-13-11, 78 NRC 177, 181-82 (2013) ("Contrary to 10 C.F.R. § 2.309(f)(1)(iii), the proffered contention is outside the scope of this proceeding, as it challenges the entire steam generator replacement project, rather than any aspect of the proposed changes to four technical specifications identified in the license amendment request.").

environmental issues fairly raised by them.”<sup>38</sup> Thus, where a contention challenges something that is not being changed by the proposed amendment, the contention’s challenge is beyond the scope of any hearing on the license amendment request. Vermont’s challenge asserting that ERDS should be maintained following the permanent shutdown of Vermont Yankee is, similarly, beyond the scope of the instant LAR because the proposed license amendment seeks only to reduce staffing levels at the facility following its permanent shutdown; it makes no request and proposes no changes to the operation of ERDS.<sup>39</sup>

Specifically, the instant LAR would revise the Vermont Yankee Site Emergency Plan (SEP) on-shift and Emergency Response Organization (ERO) staffing following the facility’s transition from an operational facility to a permanently shutdown facility.<sup>40</sup> Essentially, the LAR seeks to eliminate specific on-shift positions that are related to the operation of the reactor and are not needed for the safe storage of spent fuel in the spent fuel pool.<sup>41</sup> It would also eliminate ERO positions beyond those necessary for an effective response to credible accidents that may arise from spent fuel storage.<sup>42</sup> In support of this request, Entergy determined: (1) which accident scenarios would be applicable to the storage of spent fuel at Vermont Yankee; (2) what plant actions and emergency plan implementation actions would be required based on plant procedures to respond to these accident scenarios; (3) how these actions would be divided among the on-shift positions that Entergy requests to have manned post-shutdown; and (4) whether these actions would conflict with either the on-shift positions’ emergency plan role or

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<sup>38</sup> *Dresden*, CLI-81-25, 14 NRC at 624.

<sup>39</sup> See, e.g., LAR, Attachment 1, at 1 (stating that although “Attachments 2 and 3 include additional changes beyond those involving a reduction in staffing[,] NRC approval of these additional changes is not being requested.”).

<sup>40</sup> *Id.* Once Vermont Yankee is permanently shutdown, its on-shift and ERO staff would only be responsible for the safe storage of spent fuel. *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

operational role.<sup>43</sup> In this manner, the LAR attempts to demonstrate that Entergy's requested post-permanent shutdown staffing plan is consistent with 10 C.F.R. Part 50, Appendix E, Section IV.A.9, which states that licensees shall perform "a detailed analysis demonstrating that on-shift personnel assigned emergency plan implementation functions are not assigned responsibilities that would prevent the timely performance of their assigned functions as specified in the emergency plan."

When listing the required emergency plan implementation tasks that must be accomplished by the requested on-shift positions for each applicable accident scenario, Entergy listed the task of "Activate ERDS" as "N/A" or not applicable.<sup>44</sup> Entergy explained that this task was not included as an on-shift task requiring evaluation as part of its staffing analysis because "[t]he [Vermont Yankee] Emergency Response Data System (ERDS) link to the NRC will not be operational in a permanently shut down and defueled condition. The task of ERDS activation is therefore not included as an on-shift task requiring evaluation as part of this staffing analysis."<sup>45</sup> In other words, when the facility is permanently shutdown, the ERDS link from Vermont Yankee to the NRC will no longer be operational so no personnel will be required to activate it and, thus, the task of ERDS activation no longer has to be accounted for as part of a staffing analysis.

Vermont attempts to bring its demand that ERDS be maintained after the permanent shutdown of Vermont Yankee within the scope of the LAR, and thus this proceeding, by stating that "Entergy's [LAR] includes an attachment with Time Motion Studies that assumes that the ERDS link to the NRC will not be operational in the permanently shut down and defueled condition."<sup>46</sup> ERDS, however, is not the subject of the LAR. The operation of ERDS was

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<sup>43</sup> LAR, Attachment 4, at 10.

<sup>44</sup> *Id.* at 21, 27, 33, 39, 45.

<sup>45</sup> *Id.* at 8. "Activation" refers to the actions taken to commence the transmission of data from Vermont Yankee to the NRC via ERDS.

<sup>46</sup> Petition at 4.

apparently only mentioned in the LAR in order to help explain the acceptability of the LAR's requested reduction in staffing levels. Nowhere in the LAR does Entergy request NRC permission to alter the operation of ERDS at Vermont Yankee. Therefore, the operability of ERDS is not within the scope of the LAR. Consequently, Vermont's argument that ERDS should be maintained following the permanent shutdown of Vermont Yankee is not within the scope of this license amendment proceeding and, thus, should be denied in accordance with 10 C.F.R. § 2.309(f)(1)(iii).<sup>47</sup>

2. The Proposed Contention is an Impermissible Challenge to Commission Regulations

Vermont's proposed contention that ERDS should be maintained following the permanent shutdown of Vermont Yankee is also inadmissible because it constitutes a challenge to the Commission's regulations. The Commission's regulations at 10 C.F.R. Part 50, Appendix E, Section VI, set forth the requirements for ERDS.<sup>48</sup> These requirements state that "onsite hardware shall be provided at each unit by the licensee to interface with the NRC receiving system" and specify the required characteristics of the hardware.<sup>49</sup> However, specifically excluded from these requirements are "all nuclear power facilities that are shut down permanently . . . ."<sup>50</sup> Therefore, by rule, a permanently shutdown nuclear power facility does not need to provide the onsite hardware required to maintain the operability of ERDS. This means that a permanently shutdown facility can discontinue maintaining ERDS without NRC approval and without a license amendment.

The instant LAR does not request NRC approval or a license amendment to discontinue maintaining ERDS, it simply references, in support of its request for reduced staffing following

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<sup>47</sup> See *San Onofre*, LBP-12-25, 76 NRC at 552, 557; *Davis-Besse*, LBP-13-11, 78 NRC at 181-82

<sup>48</sup> See 10 C.F.R. § 50.72(a)(4) n.4 ("Requirements for ERDS are addressed in Appendix E, Section VI.").

<sup>49</sup> 10 C.F.R. Part 50, Appendix E, VI.2.

<sup>50</sup> *Id.*

the permanent shutdown of Vermont Yankee, the fact that ERDS is not required to be operational when Vermont Yankee is permanently shutdown.<sup>51</sup> Thus, Vermont's proposed contention does not raise an issue with the LAR but, instead, challenges the Commission's regulations excluding permanently shutdown facilities from the ERDS requirement. Since the Commission's regulations cannot be challenged in an individual license amendment proceeding without a waiver of the regulations<sup>52</sup> and since Vermont has not petitioned for such a waiver in this proceeding, Vermont's request should be denied as beyond the scope of this proceeding.<sup>53</sup>

3. The Board Has No Jurisdiction Over the Staff's NSHC Determination

Vermont's proposed contention is inadmissible to the extent that it challenges the Staff's NSHC determination. Specifically, Vermont argues that Entergy "failed to demonstrate that its license amendment request . . . will not significantly reduce the margin of safety or significantly increase the consequences of an accident previously evaluated as required by 10 CFR § 50.92" and that the license amendment request "'creates the possibility of a new or different kind of accident.'" Petition at 4-5 (quoting *San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d 1268, 1270 (9th Cir. 1986)).<sup>54</sup> This language mirrors the language of the Commission's NSHC

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<sup>51</sup> See LAR, Attachment 4, at 8.

<sup>52</sup> 10 C.F.R. § 2.335.

<sup>53</sup> See *Peach Bottom*, ALAB-216, 8 AEC at 20 ("[A] licensing proceeding before this agency is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process."). Vermont may, of course, petition for rulemaking regarding the Commission's ERDS requirements in accordance with the provisions of 10 C.F.R. § 2.802.

<sup>54</sup> *San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d 1268 (9th Cir. 1986) (reversing a Commission NSHC determination) does not stand for the proposition that intervenors may challenge Staff NSHC determinations before licensing boards. This is because, in the Commission case that was appealed to the Ninth Circuit and resulted in the *SLO Mothers for Peace* decision, the Commission held that "there is no right of direct appeal to the Commission regarding the merits of the Staff's [NSHC] finding." *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986). That being said, the Commission went on to reach a merits conclusion anyway based on its own initiative and its supervisory authority to review the Staff's findings. *Id.* Therefore, the Ninth Circuit ruling effectively reversed the Commission's ultimate merits holding but it did not affect the Commission's procedural holding. See *SLO Mothers for Peace*, 799 F.2d at 1270-71. As a result, this case does not stand for the proposition that a party may challenge a Staff NSHC determination at the licensing board or Commission level.

determination rule at 10 C.F.R. § 50.92(c).<sup>55</sup>

With respect to challenges to the Staff's NSHC determinations, the Commission's regulations state that "[n]o petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission. The staff's determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination."<sup>56</sup> A licensing board "has no jurisdiction to consider an intervention petition seeking to challenge a Staff's final no significant hazards consideration determination."<sup>57</sup> As the *Shoreham* board explained, the Staff's NSHC determination is merely a procedural determination that a license amendment may be issued before the resolution of any related hearing requests; it affects only the timing of the issuance of an amendment and is not a substantive determination of public health and safety issues for the hearing on the proposed amendment.<sup>58</sup> Therefore, to the extent that Vermont is challenging the Staff's NSHC determination, it is raising an inadmissible issue beyond the Board's authority and, thus, beyond

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<sup>55</sup> See 10 C.F.R. § 50.92(c) ("The Commission may make a final determination . . . that a proposed amendment to an operating license . . . involves no significant hazards consideration, if operation of the facility in accordance with the proposed amendment would not: (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) Involve a significant reduction in a margin of safety.").

<sup>56</sup> 10 C.F.R. § 50.58(b)(6). See *Zion*, LBP-98-24, 48 NRC at 222-23.

<sup>57</sup> *Zion*, LBP-98-24, 48 NRC at 222. See also *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-05-14, 61 NRC 359, 361 n.2 (2005); *Davis-Besse*, LBP-13-11, 78 NRC at 181 n.18 (stating that "insofar as the Petition could possibly be read as a challenge to the NRC Staff's proposed no significant hazards consideration determination under 10 C.F.R. § 50.92(c), this Board lacks jurisdiction to adjudicate that claim"); *FPL Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-08-20, 68 NRC 549, 550-51 (2008); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-08-18, 68 NRC 533, 541 (2008) (finding inadmissible proposed contentions that challenged a proposed license amendment as not meeting the various parts of the standard set out in 10 C.F.R. § 50.92(c) for significant hazards consideration determinations); *Shoreham*, LBP-91-7, 33 NRC at 183; Final Procedures and Standards on No Significant Hazards Considerations, 51 Fed. Reg. 7,744, 7,759 (Mar. 6, 1986) (final rule) ("To buttress this point, the Commission has modified § 50.58(b)(6) to state that only it on its own initiative may review the staff's final no significant hazards consideration determination.").

<sup>58</sup> *Shoreham*, LBP-91-7, 33 NRC at 183.



the scope of this proceeding.<sup>59</sup>

B.     The Proposed Contention is Not Material to the Findings the NRC Must Make on  
          the LAR

Whether Entergy should be required to maintain ERDS following the permanent shutdown of Vermont Yankee is not material to the findings the NRC must make in order to decide whether to approve the instant LAR. As explained above, the LAR only addresses the proposed staffing levels at Vermont Yankee following its permanent shutdown. Therefore, the ERDS issue raised by Vermont's Petition does not "impact the grant or denial" of Entergy's pending staffing proposal.<sup>60</sup>

In determining whether an amendment to a license will be issued, the Commission is guided by the considerations that govern the issuance of initial licenses to the extent applicable and appropriate.<sup>61</sup> As the proposed contention points out,<sup>62</sup> this would include the required determination of reasonable assurance that the activities authorized by the LAR can be conducted without endangering the health and safety of the public and will be conducted in compliance with the Commission's regulations,<sup>63</sup> and that adequate protective measures can and will be taken in the event of a radiological emergency.<sup>64</sup> Accordingly, the questions material to the resolution of the LAR are: (1) whether the proposal to reduce Vermont Yankee's staffing following its permanent shutdown is consistent with the Commission's regulations; (2) whether there is reasonable assurance that activities at the facility can be conducted with the reduced

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<sup>59</sup> *Id.* ("Commission regulation is very clear that a Licensing Board is without authority to review Staff's significant hazards consideration determination. . . . The part of the Commission's notice . . . relating to Staff's significant hazards consideration determination is beyond the scope of the hearing on the proposed amendment.").

<sup>60</sup> *Indian Point*, LBP-08-13, 68 NRC at 62.

<sup>61</sup> 10 C.F.R. § 50.92(a).

<sup>62</sup> Petition at 4.

<sup>63</sup> 10 C.F.R. § 50.57(a)(3).

<sup>64</sup> 10 C.F.R. § 50.47.

staffing level without endangering the health and safety of the public; and (3) whether the reduced number of individuals can perform their duties so that adequate protective measures can and will be taken in the event of a radiological emergency. The fact that, consistent with the Commission's rules, ERDS will no longer be operational after the permanent shutdown of Vermont Yankee does not make a difference to these findings that the Staff must make.

In conclusion, because the proposed contention asserts that Entergy should maintain ERDS at Vermont Yankee following its permanent shutdown and because this issue is not material to the Staff's resolution of the LAR, the proposed contention fails to raise a material issue and, thus, should be denied pursuant to 10 C.F.R. § 2.309(f)(1)(iv).<sup>65</sup>

III. Vermont Has Not Met the Applicable Requirements for a Subpart G Proceeding

Vermont's request for the application of the formal hearing provisions of 10 C.F.R. Subpart G to this proceeding<sup>66</sup> should be denied for failing to meet the applicable regulatory requirements in 10 C.F.R. § 2.310.

Pursuant to 10 C.F.R. § 2.310(d), license amendment proceedings will only be conducted under Subpart G procedures if "the presiding officer by order finds that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter . . . ." Otherwise, the applicable procedures are found in Subpart L which, together with Subpart C, typically "govern[s] all adjudicatory proceedings conducted under the authority of the Atomic Energy Act of 1954, as amended, the Energy

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<sup>65</sup> See *PFS*, LBP-98-7, 47 NRC at 179-80; *Davis-Besse*, LBP-13-11, 78 NRC at 181-82 ("Contrary to 10 C.F.R. §2.309(f)(1)(iv), the contention raises no issues that are material to any findings the NRC must make to approve the license amendment request, as it does not focus at all on the technical specifications that are the subject of that request.").

<sup>66</sup> Petition at 5-6.

Reorganization Act, and 10 CFR part 2 . . . .”<sup>67</sup>

Vermont argues that it is entitled to “[e]xtensive discovery and a full hearing” because of “Entergy’s failure to engage [Vermont] before submitting this license amendment request.”<sup>68</sup>

However, Entergy’s alleged failure to adequately engage Vermont is not a reason to proceed under Subpart G procedures. Contrary to 10 C.F.R. § 2.310(d), Vermont has not demonstrated that either witness credibility or party motive is likely to be material to the resolution of its proposed contention.<sup>69</sup>

Vermont also argues that there is a high degree of public interest in its proposed contention and that Subpart G procedures are necessary to ensure public confidence in the proceeding and its decision.<sup>70</sup> However, this is not grounds for a Subpart G hearing, either. In response to a substantively identical argument, an earlier *Vermont Yankee* board stated that “there is nothing in the plain language of 10 C.F.R. § 2.310(d) to support [this] position” and that “[t]he Commission heard and rejected these arguments when it promulgated the [selection of hearing procedures rule].”<sup>71</sup>

For the foregoing reasons, Vermont’s request for the application of the formal hearing procedures of Subpart G should be denied.

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<sup>67</sup> 10 C.F.R. § 2.1200. See also 69 Fed. Reg. at 2,222 (“Unless otherwise provided in § 2.310, proceedings involving hearings on the . . . licensee-initiated amendment . . . of licenses . . . must ordinarily use Subpart L procedures.”); *Vermont Yankee*, LBP-04-31, 60 NRC at 693-95.

<sup>68</sup> Petition at 5-6.

<sup>69</sup> To the extent that Vermont is concerned that Entergy may not fully comply with its duty to disclose documents under 10 CFR § 2.336(a) as part of any proceeding, granting a Subpart G proceeding is not the proper remedy. The Board should “not presume that a party will not comply with its duty to disclose ‘all documents . . . relevant to the contentions.’” *Vermont Yankee*, LBP-04-31, 60 NRC at 698, quoting 10 C.F.R. § 2.336(a)(2)(i). Instead, any unexcused failure to make a full disclosure should be remedied through the imposition of sanctions against the offending party. *Id.*, citing 10 C.F.R. § 2.336(e).

<sup>70</sup> Petition at 6.

<sup>71</sup> *Vermont Yankee*, LBP-04-31, 60 NRC at 697. The board went on to note that “[t]hese policy choices, embodied in the final regulation, are not subject to attack in an adjudicatory proceeding.” *Id.*

CONCLUSION

For the reasons stated above, the Board should deny Vermont's Petition to Intervene and Hearing Request for failing to proffer an admissible contention.

Respectfully submitted,

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 20th day of October, 2014

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT	)	
YANKEE, LLC	)	
AND ENTERGY NUCLEAR	)	Docket No. 50-271-LA
OPERATIONS, INC.	)	
	)	
(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO VERMONT DEPARTMENT OF PUBLIC SERVICE NOTICE OF INTENTION TO PARTICIPATE, PETITION TO INTERVENE, AND HEARING REQUEST," dated October 20, 2014, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 20th day of October, 2014.

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 20th day of October, 2014